

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: June 7, 2022

**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**Trademark Trial and Appeal Board**

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*In re Mr. Bator LLC*

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Serial No. 88244852

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Leon G. Rendeiro Jr. of Rendeiro IP Law, P.A.,  
for Mr. Bator LLC.

Ellen J.G. Perkins, Trademark Examining Attorney, Law Office 110,  
Chris A. F. Pedersen, Managing Attorney.

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Before Pologeorgis, English, and Lebow,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Mr. Bator LLC (“Applicant”) seeks registration on the Supplemental Register of the designation MULLET (in standard characters) for “bicycles” in International Class 12.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88244852, filed on December 28, 2018. The application was originally filed seeking registration on the Principal Register based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). On October 18, 2019, Applicant filed an amendment to allege use, claiming September 2017 as both the date of first use and first use in commerce. Additionally, in its request for reconsideration dated May 15, 2020, Applicant requested an amendment of its application to seek registration of its proposed mark on the Supplemental Register. The Examining Attorney approved both the amendment to allege use and the amendment to seek registration on the Supplemental Register.

The Trademark Examining Attorney refused registration on the Supplemental Register under Trademark Act Sections 23(c) and 45, 15 U.S.C. §§ 1091(c) and 1127, on the ground that MULLET is the generic name for a type of bicycle and thus incapable of distinguishing them from those of others.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. Both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we reverse the refusal to register.<sup>2</sup>

## **I. Genericness - Applicable Law**

A mark proposed for registration on the Supplemental Register must be capable of distinguishing the applicant's goods or services. 15 U.S.C. § 1091. "Generic terms do not so qualify." *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017); *see also Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1372 n.3 (Fed. Cir. 2018) (citing *In re Am. Fertility Soc'y*, 188 F.3d 1341, 51 USPQ2d 1832, 1833 (Fed. Cir. 1999)); *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (generic terms "are by definition incapable of indicating a particular source of the goods or services"). "[R]egistration is properly refused if the word is the generic name of any of the goods or services for which registration is sought." *In re Cordua Rests., Inc.*, 823 F.3d 594,

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<sup>2</sup> All TTABVue and Trademark Status and Document Retrieval ("TSDR") citations reference the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .pdf version of the documents.

118 USPQ2d 1632, 1638 (Fed. Cir. 2016) (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:57 (4th ed. 2016)).

A generic term “is the common descriptive name of a class of goods or services.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (citing *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). There is a two-part test used to determine whether a designation is generic: (1) what is the genus (class or category) of goods or services at issue?; and (2) does the relevant public understand the designation primarily to refer to that genus of goods or services? *Princeton Vanguard*, 114 USPQ2d at 1803 (citing *Marvin Ginn*, 228 USPQ at 530); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1462 (TTAB 2014). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Marvin Ginn*, 228 USPQ at 530.

Any term that the relevant public uses or understands to refer to the genus of goods, or a key aspect or subcategory of the genus, is generic. *Royal Crown Co., Inc. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046-47 (Fed. Cir. 2018). “[A] term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole.” *Cordua*, 118 USPQ2d at 1638 (holding CHURRASCOS, a word that is generic for a type of grilled meat, to be generic for restaurant services because it referred to a key aspect of those services); *see also In re Nordic Nat., Inc.*,

755 F.3d 1340, 111 USPQ2d 1495 (Fed. Cir. 2014) (CHILDREN’S DHA generic for DHA supplements for children); *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985) (BUNDT generic for ring cake mixes, *i.e.*, the subcategory “bundt cakes.”).

“Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987)); *see also Cordua*, 118 USPQ2d at 1634; *Princeton Vanguard*, 114 USPQ2d at 1830; *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (finding third-party websites competent sources for determining what the relevant public understands mark to mean). However, if the evidence of record, when viewed in its totality, constitutes a mixed use of a term as both the generic name of the goods or services and as a source indicator for such goods or services, then such evidence would not demonstrate that the primary significance of the term is the generic name of the goods or services. *See Merrill Lynch*, 4 USPQ2d at 1143 (“The mixture of usages unearthed by the NEXIS computerized retrieval service does not show ... that the financial community views and uses the term CASH MANAGEMENT ACCOUNT as a generic, common descriptive term for the brokerage services to which Merrill Lynch first applied the term”); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1765 (TTAB 2013) (“However, when considered in conjunction with the testimony of respondent’s

competitors, these uses result in at best a mixed record of use of the phrase both generically and as part of what appear to be trademarks or trade names. This ambiguous evidence thus fails to establish that the primary significance of ANNAPOLIS TOURS to the relevant public is guided tour services of cities, rather than a guided tour service of cities provided by a particular entity.”); *In re America Online*, 77 USPQ2d 1618, 1623 (TTAB 2006) (“the evidence of generic use is offset by Applicant’s evidence that shows not only a significant amount of proper trademark use but also trademark recognition [by third parties]”).

#### **A. What is the Genus of the Goods at Issue?**

Our first task is to determine the proper genus. In defining the genus, we commonly look to the identification of goods or services in the application. *See Reed Elsevier*, 82 USPQ2d at 1380; *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (a proper genericness inquiry focuses on the identification set forth in the application or certificate of registration); *In re Serial Podcast, LLC*, 126 USPQ2d 1061, 1063 (TTAB 2018) (proper genus generally is “set forth by the recitation of services in each subject application.”). We find that the genus of goods at issue in this case is adequately defined by Applicant’s identification of goods, namely, “bicycles.” Applicant does not dispute that this is how the genus is defined.

#### **B. Who are the Relevant Purchasers?**

The second part of the test is whether the term sought to be registered is understood by the relevant public primarily to refer to that genus of goods or services. “The relevant public for a genericness determination is the purchasing or consuming

public for the identified goods.” *Frito-Lay N. Am., Inc. v. Princeton Vanguard LLC*, 124 USPQ2d 1184, 1187 (TTAB 2017) (citing *Magic Wand*, 19 USPQ2d at 1552); *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d 1341, 1351 (TTAB 2013). Because there are no restrictions or limitations to the channels of trade or classes of consumers for Applicant’s identified goods, the relevant consuming public consists of the public at large, namely, ordinary consumers who purchase bicycles.

### **C. How does the Relevant Public Perceive the Designation MULLET?**

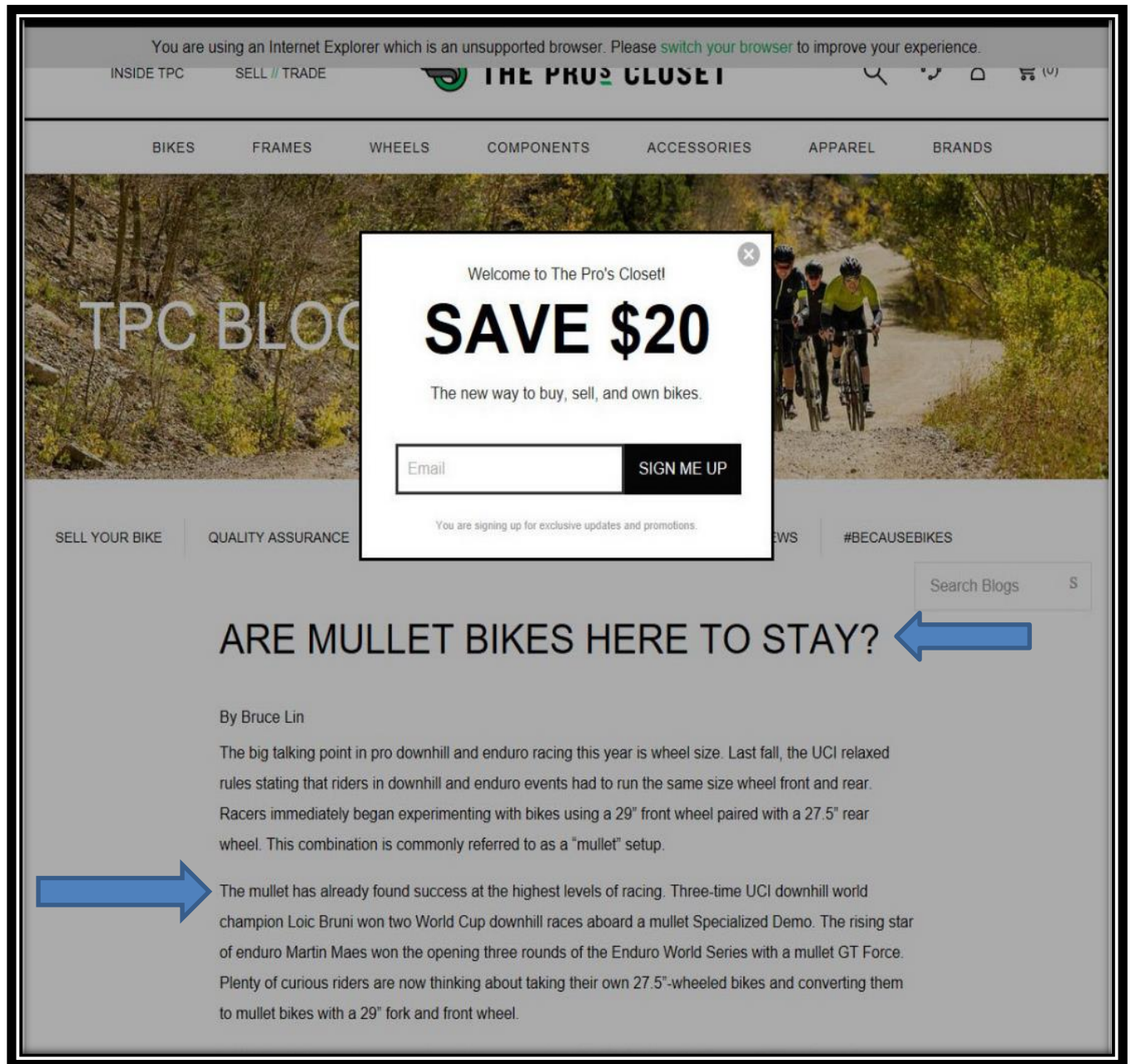
The Examining Attorney argues that MULLET refers to a specific type or subcategory of bicycles, namely, a bicycle with two different sized wheels.<sup>3</sup> In support of her argument, the Examining Attorney submitted screenshots from various websites showing the use of MULLET as the generic name of a subgenus of Applicant’s identified goods. The evidence is summarized below:<sup>4</sup>

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<sup>3</sup> Examining Attorney’s Brief, p. 7, 14 TTABVUE 8.

<sup>4</sup> September 15, 2019 Office Action (TSDR pp. 12-31); November 14, 2019 Office Action (TSDR pp. 5-49); July 23, 2020 Office Action (TSDR pp. 6-57); and February 17, 2021 Office Action (TSDR pp. 5-38). The blue arrows are provided by the Board for emphasis.

- [www.theproscloset.com](http://www.theproscloset.com)



- [www.theproscloset.com](http://www.theproscloset.com) (cont'd)

Though it may seem novel, this isn't the first time the bike industry has played with mixed wheel sizes. Many astute Internet commenters immediately pointed out that the Foes Mixer is a mullet bike that's been in production for several years. Some may also remember the Specialized Big Hit from the early 2000s, which paired the 26" front wheel with a 24" rear.



- [www.bikemag.com](http://www.bikemag.com)

The ones and zeros haven't even dried on [Bike's Youtube entry into the mixed-wheel-sized debate](#), and an email pings on my iPhone while I'm sitting down to dinner last night. Alchemy is introducing a mullet bike.

I didn't want to call it a mullet bike, by the way. But I've learned that the internet has made its choice. And anyone holding out doesn't have a great fallback. 79er isn't quite perfect, and 7.5 9er has no ring to it. So, Alchemy is banking on the alphanumeric Nine 7 Five. And before anyone starts, we know Alchemy isn't the first one to do this. We know about the '90s and '00s. We know about Liteville, Foes and Mullet. This just seems to take it to another level.

- [www.cyclingmagazine.com](http://www.cyclingmagazine.com)

Mullet bikes are the hottest new technology on the World Cup scene this year, but none more so than Finn Iles' flame and chrome Sepcilized Demo. Iles has been running a 29" wheel up front matched with a 27.5" wheel in the back. The mixed wheel size setup is supposed to give the rolling advantage of 29-ers with the acceleration and cornering feel of 27.5. The set-up seemed to work well for Iles at Panorama. The young Specialized Gravity Racing rider walked away with his first elite Canadian national championships title in a closely fought race with Kirk McDowall and Magnus Manson.



- [www.jensonusa.com](http://www.jensonusa.com)

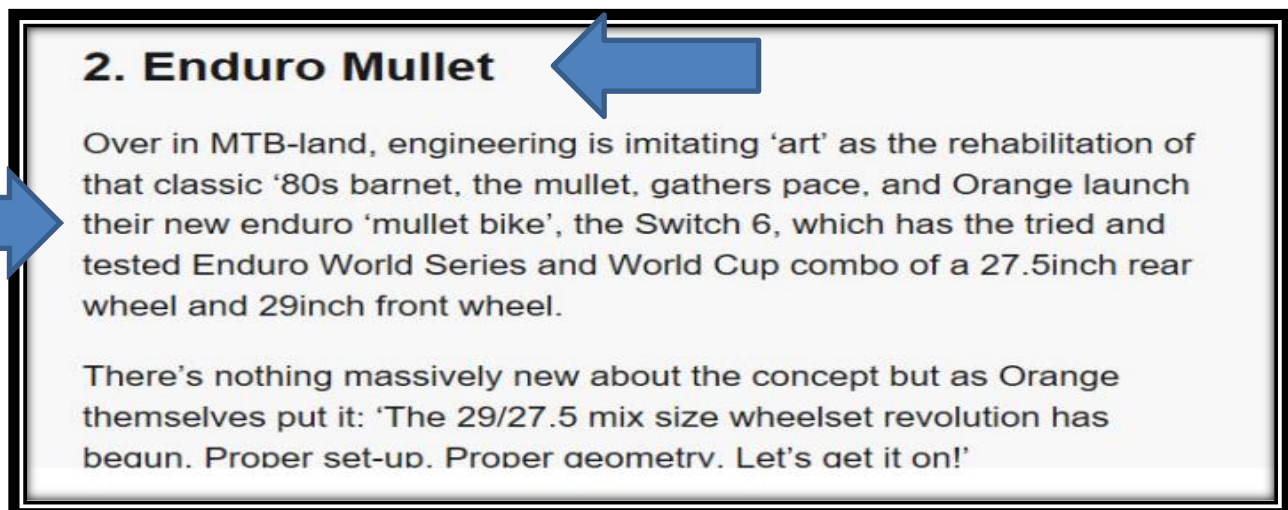
<https://www.jensonusa.com/Intense-Primer-S-Expert-Bike-2020> 11/14/2019 06:39:00 AM

Now everyone knows that mountain bikers have strong opinions on wheel sizes. To quote the hilarious Youtube video *How to be a Mountain Biker* by IFHT Films, "pick a wheel size and be a di\*k about it". With the 2020 Intense Primer, the days of a specific bike only being available with one wheel size are over. Want a 29er? Great! Want a 27.5 play bike? Also great! Want to be like all those EWS and DH pros and run a "mullet" bike? You can do that too! The Intense Primer 2020 comes in both major wheel sizes and even a mix of both. You are currently looking at the S Expert version of the 2020 Primer.

- [www.redbull.com](http://www.redbull.com)



- [www.redbull.com](http://www.redbull.com) (cont'd)



- [www.notubes.com](http://www.notubes.com)




Photo Credit: Derek Bissett


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## Staff Bike: Derek Bissett's Mullet Bike

*Mullet bikes aren't just for downhillers. Our very own Derek Bissett, one of Stan's Mechanical Engineers, built up one of his own that's intended for fun, everyday trail riding. His interest in riding bikes with different wheel sizes goes back to 2009, when he had a Trek 69er, a cross country-focused hardtail mountain bike with a 29" wheel up front and a 26" wheel out back. Ever since then, he's been thinking about having another bike with differently sized wheels.*




- [www.wheelrangers.com](http://www.wheelrangers.com)

<https://wheelrangers.com/mullet-bikes-whats-it-all-about/> 11/14/2019 06:44:20 AM

WHEEL WRANGLERS

## "Mullet" Bikes....What's it all about?

September 15, 2019





- [www.wheelrangers.com](http://www.wheelrangers.com) (cont'd)

What the heck is a "Mullet" bike? It's a party in the back, business in the front, of course. What this means for a mountain bike is a 27.5" rear wheel with a 29" front. The "Mullet" moniker stuck because 27.5" wheels are regarded as more nimble and playful, and 29" wheels are regarded as faster, but perhaps less fun according to some riders.

Sorry, that is getting close to entering a wheel size debate here. Our stance? 29" wheeled bikes are fast, and fun. 27.5" wheeled bikes? Also very fun, and fast. Neither is going away, and both work really well. We have been fortunate to ride a lot of bikes over the last decade in both wheel sizes. 29" wheeled bikes drastically improved recently, and dating back to about 2017 began to adopt geometry other than strictly for XC riding. This is when 29ers became "fun" and not just all about speed and "business." The Kona Process 111 was the first to push the boundaries on geometry a 29er could have, with a "long, low, and slack" shape, and a attitude ready to party. It was said to be the first 29er that "didn't feel like a 29er." The new 2020 Kona Process 134 now takes this bikes place in the lineup. Over the last couple years, some of our staff fully switched to riding 29ers as more brands followed the trend and made "shreddy" enduro and trail 29er bikes with more travel. However hopping back on 27.5" wheeled bikes more recently reminded us how they are not slow, and are really fun.

- [www.alchemybicycles.com](http://www.alchemybicycles.com)


<https://alchemybicycles.com/journal/5-reasons-why-you-might-be-riding-a-mullet-bike-in-2020/>  
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alchemy BIKES GEAR WHY JOURNAL SUPPORT DEMO  
FREE ENVE M7 HANDLEBAR UPGRADE WITH COMPLETE MOUNTAIN



5 REASONS WHY YOU MIGHT  
BE RIDING A MULLET BIKE  
IN 2020

- [www.alchemybicycles.com](http://www.alchemybicycles.com) (cont'd)



Mixed-wheel bikes, mullet bikes, Franken-bikes...call them what you want, but riding different-size wheels on a mountain bike has been a hot topic in 2019.

Maybe it's because the UCI finally "legalized" them for competition, or maybe it's the fact that when used in competition, riders actually won races on mixed wheel mountain bikes.

Regardless, the trend to run a 29-inch front and 27.5 rear wheel combination is here to stay. And with features like quicker handling, faster acceleration, and the combined benefits of a 29er and a 27.5 wheel, it makes sense for serious endurance riders to be eyeing a mixed-wheel bike to add to their collection.

- [www.bikeradar.com](http://www.bikeradar.com)

<https://www.bikeradar.com/features/what-is-faster-mullet-bike-29er/> 07/23/2020 07:02:41 AM



Savings on Bikes, Apparel, & More

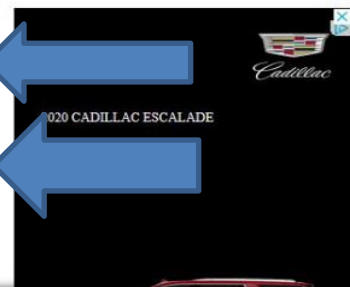
SHOP NOW



Home > Features > What's faster, a 29er or mullet bike setup?

## What's faster, a 29er or mullet bike setup?

Are big wheels always faster? Or can a "mullet" setup with a smaller back wheel give you more speed and style? We set racer, coach and tech-expert Will Soffe the challenge to find out






- [www.bikeradar.com](http://www.bikeradar.com) (cont'd)


## What is a mullet bike?



A mullet bike uses different sized wheels, most commonly a 29in wheel at the front and a 27.5in wheel at the back. *Andy Lloyd*

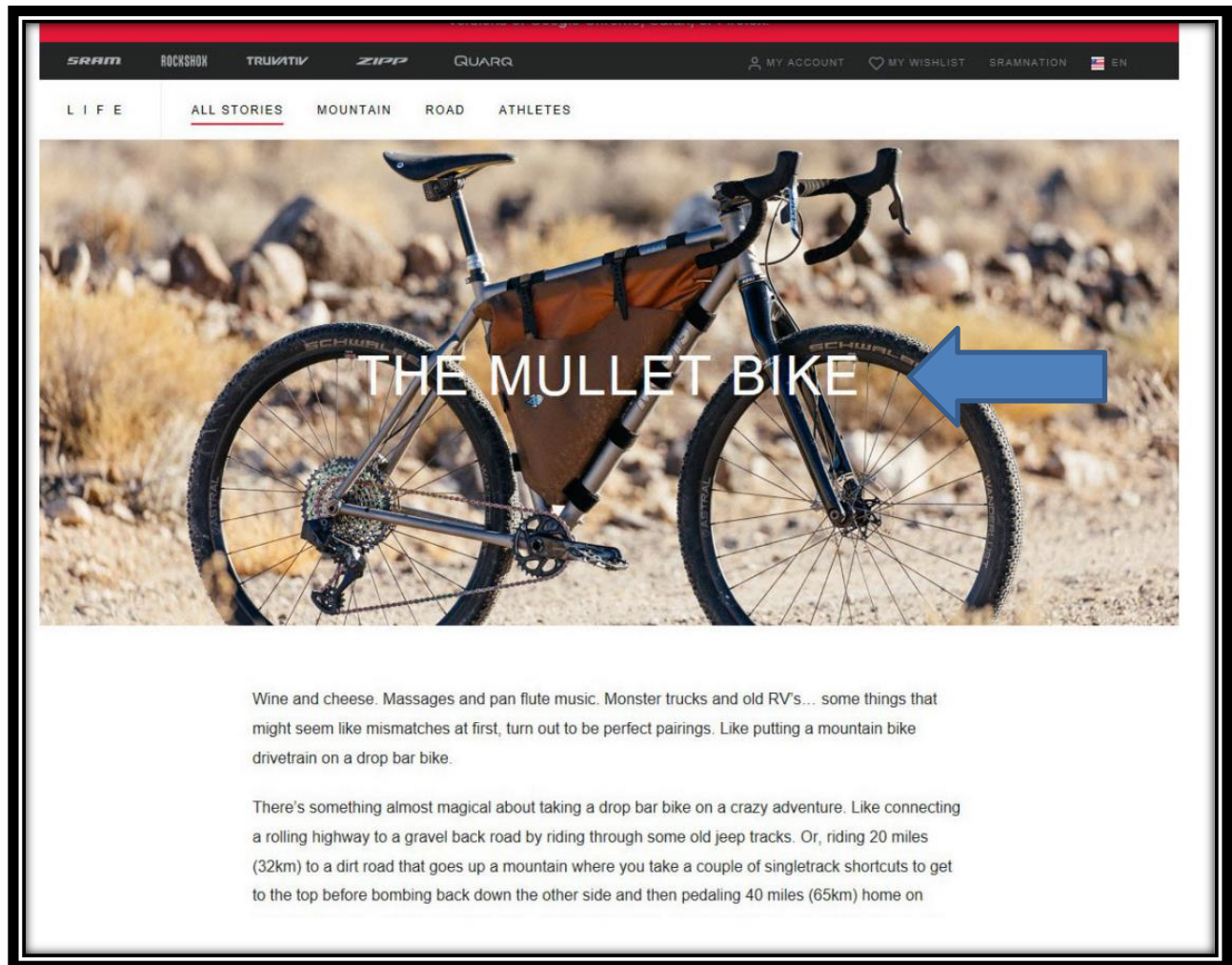


Mullet bikes use different sized wheels, most commonly a 29in front wheel paired with a 27.5in wheel. For those not au fait with bad haircuts, the name is a reference to the once-popular uneven haircut, short on the front and sides, long at the back.



Mullet bike proponents claim the 29in wheel offers rolling speed and better bump roll-over at the front, with the 27.5in wheel bringing sharp handling at the rear. Business at the front, party at the back, in other words.

- [www.sram.com](http://www.sram.com)



- [www.enduro-mtb.com](http://www.enduro-mtb.com)



We've all heard the jokes, business at the front, party at the back. 29/27.5" Mullet bikes are a red-hot topic, from the DH World Cup to heated discussions with your mates. But before you ruin your bike and bank balance with a wheel swap we dive deep into mixed wheel sizes to see if you really can have the best of both worlds.



- [www.enduro-mtb.com](http://www.enduro-mtb.com) (cont'd)

## What is a mullet bike?

A mullet bike is one that mixes wheel sizes – most commonly a 27.5” wheel in the rear and a 29” wheel up front. Some brands like MDE, LAST, Liteville and Foes (and many others) offer 27.5” wheel size bikes as standard, while many other mullet bikes have been created by squeezing a 29” wheel into the front of their 27.5” bike, or a 27.5” wheel into the front of their 29” bike. In paper, it sounds great, the best of both worlds, with a 29” front wheel for grip and a flickable rear wheel for mid-corner parties. Is a 29” front wheel and 27.5” rear the p

- [www.canyon.com](http://www.canyon.com)

## What's a mullet bike?

A mullet bike is a MTB whose wheels are 29” up front and 27.5” out the back. Mullet bikes are becoming more common as riders strive to strike a balance between the advantages of each wheel size on one bike. A 29 inch front wheel offers stability, traction and the rollover advantage of a bigger wheel punching head first down the trail. The smaller rear end allows you to throw your weight further back and shaves off a bit of weight while capitalising on the extra stiffness and manoeuvrability of the wheel allowing you to show off skills as you shrap around the berms. Our Spectral:ON comes with a mullet bike setup as



- [www.lightbicycle.com](http://www.lightbicycle.com)



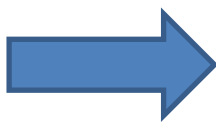
Have you ever bought two different sized wheelsets for your mullet bike? With Light Bicycle you don't have to do that. Contact our customer support team and we'll help you order just the wheels you need for your mullet bike.

Mullet wheelsets are a combination of two different wheel sizes in one wheelset to change the riding characteristics of a bike. Mullet bikes have been around since the creation of the iconic Penny-Farthing and have continued to evolve with the introduction of new wheel sizes. With mountain bikes, the combination started with a 26 inch wheel in the front and a 24 inch wheel in the back. Currently, the most common mullet combination is a 29 inch front wheel and a 650B rear wheel. This is done to make a bike feel snappy, nimble and playful.

**Mullet wheels combine the smooth rolling of a larger front wheel with the playfulness of a**



- [www.lightbicycle.com](http://www.lightbicycle.com) (cont'd)



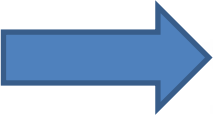
## **Never heard of a mullet bike? Here's some more information.**

Larger wheels roll over obstacles better providing a smoother ride and a larger contact patch for more grip. 29er wheeled bikes were introduced due to the low attack angle and the amount of traction those wheels offer. This ushered in a new generation of bigger wheels, longer bikes and slacker head tube angles. Though stable and predictable, this new generation left some riders yearning for a more lively and playful bike. This is where mullet bikes come in.

Swapping out the rear wheel for a smaller diameter 650B (27.5) rim brings back the playful feel that was missing, by slackening out the head tube angle, lowering the bottom bracket, and decreasing the effective length of the bike. Combining 29er and 650B wheels together provides the rolling benefits of a larger wheel while making the rear end of the bike feel lively and fast around tight corners.


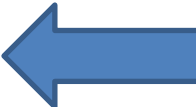
The major drawbacks with mullet bikes is the need to purchase two wheelsets from retailers since they

- [www.twowheelwonderer.com](http://www.twowheelwonderer.com)



The idea of a mullet bike isn't really new. Moto bikes and dirt bikes have pretty much always had larger front wheels and smaller rear wheels to maximize acceleration. Among the biking scene, some old-school mountain bikers like Keith Bontrager even tried out a mullet set-up in the early days with 29" in the front and 26" in the back.

But it wasn't until the 27.5" wheel entered the scene that mullet mountain bikes have started to gain attention for their potential. Today, both riders and brands are testing them out with great success. For example, pro-Enduro rider Isabeau Courdurier is rocking a mullet bike and she usually stands at the top of the podium at the end of her races. DH champ Loic Bruni has also celebrated many of his recent World Cup wins on a mullet bike.



The Examining Attorney also submitted screenshots from Applicant's website, [www.mulletcycles.com](http://www.mulletcycles.com), to demonstrate that Applicant offers a bike whose front wheel is larger than the back wheel under the MULLET designation.<sup>5</sup> Based on the foregoing evidence, the Examining Attorney concludes that Applicant's proposed mark is the generic name of a subcategory of bicycles.

#### **D. Applicant's Arguments and Evidence**

In challenging the refusal, Applicant argues that the Examining Attorney failed to show sufficient non-trademark use of the designation MULLET to support the refusal to register.<sup>6</sup> Applicant further maintains that the designation MULLET is not generic for its identified goods, and that instead, industry professionals refer to bikes with different sized wheels by their common name, i.e., a "mixed wheel" bike or an MX.<sup>7</sup>

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<sup>5</sup> September 15, 2019 Office Action (TSDR pp. 5-11).

<sup>6</sup> Applicant's Appeal Brief, pp. 3-4 (14 TTABVUE 4-5).

<sup>7</sup> *Id.* at pp. 8-9 (14 TTABVUE 9-10).

In support of its position, Applicant submitted online articles and blogs written by persons in the biking industry that purportedly demonstrate that the designation MULLET is a source indicator for Applicant's bicycles. For instance, Applicant submitted articles written by Mountain Bike Action, allday magazine, singletracks, vitalmtb, Slacker Bike, Swiss Cycles, Sixty + Cycling, Whip Off, Mountain Bike Gateway, The Loam Wolf, Bermstyle and Mountain Flyer, each discussing a new product launch by Applicant and which do not make reference to the new bike as a "mullet" bike, but instead refer to it by its purported common industry name, i.e., a mixed-wheel bike.<sup>8</sup> These articles also include text demonstrating trade name and trademark use, as well as photographs of Applicant's goods with the term MULLET on the goods showing valid trademark use of said term. A representative sample is provided below:

- [www.mbaction.com](http://www.mbaction.com)

Definitely one of the more interesting bikes seen in the pits was this titanium bike with elevated chainstays at the Mullet Cycles booth. In addition to the frame design, what makes the Mullet bikes unique is their dedicated mixed wheel set with a front 29'er coupled with a 27.5 rear wheel.



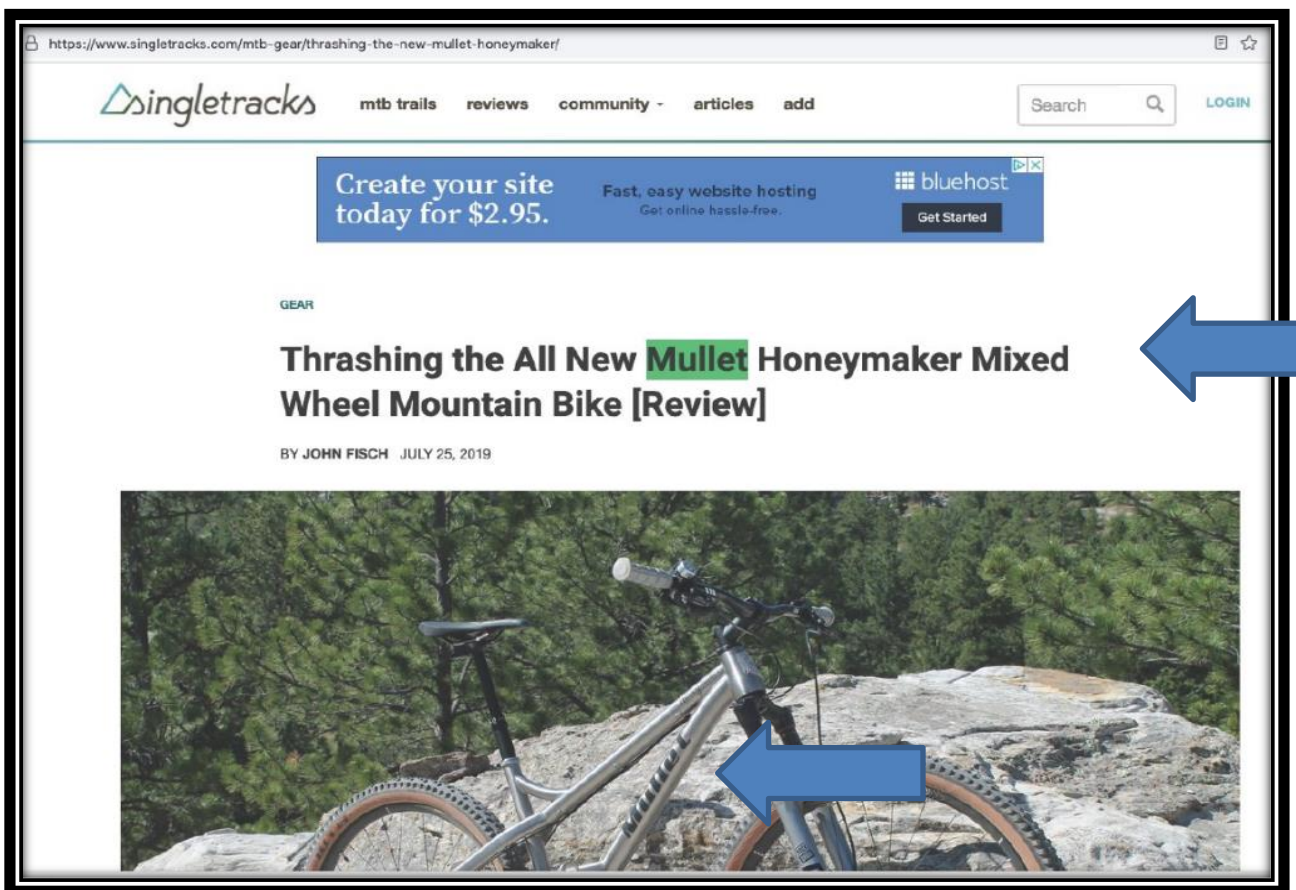
<sup>8</sup> August 17, 2021 Request for Reconsideration (TSDR pp. 15-130).



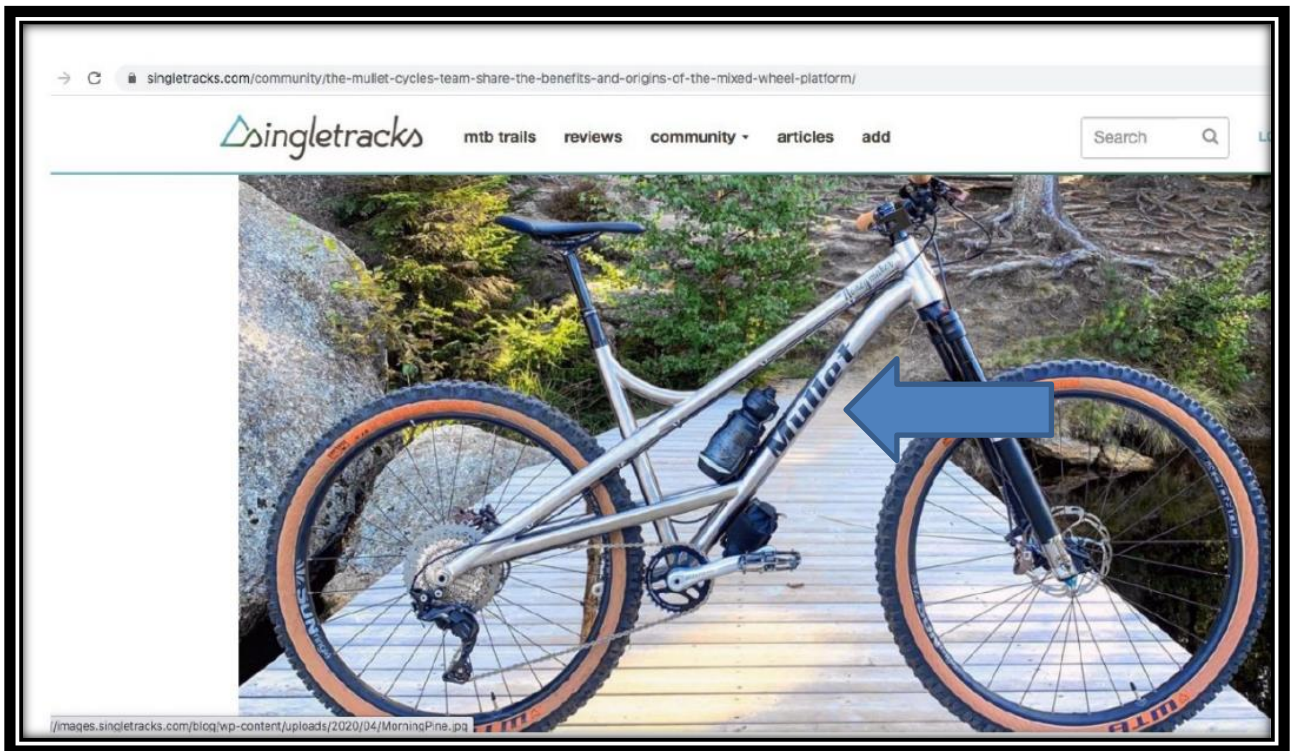
- [www.allday.life](http://www.allday.life)



- [www.singletracks.com](http://www.singletracks.com)



- [www.singletracks.com](http://www.singletracks.com) (cont'd)

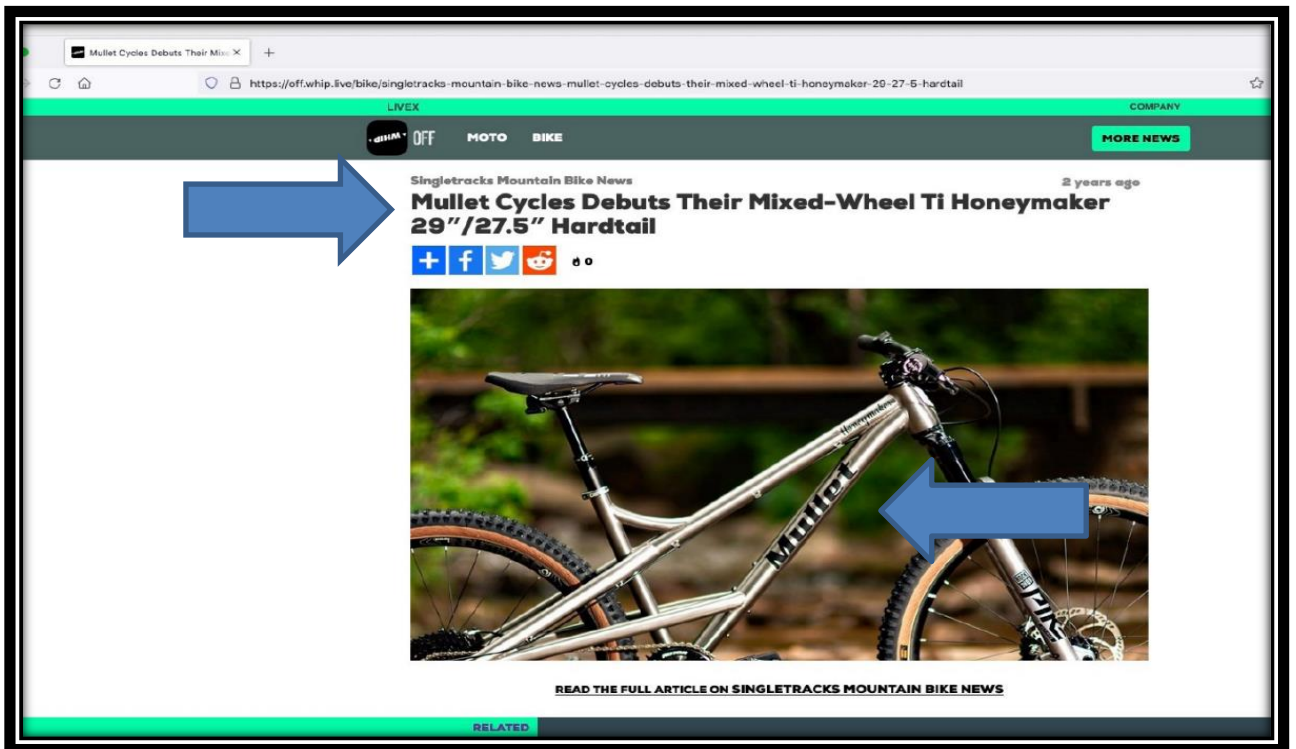


- [www.singletracks.com](http://www.singletracks.com) (cont'd)

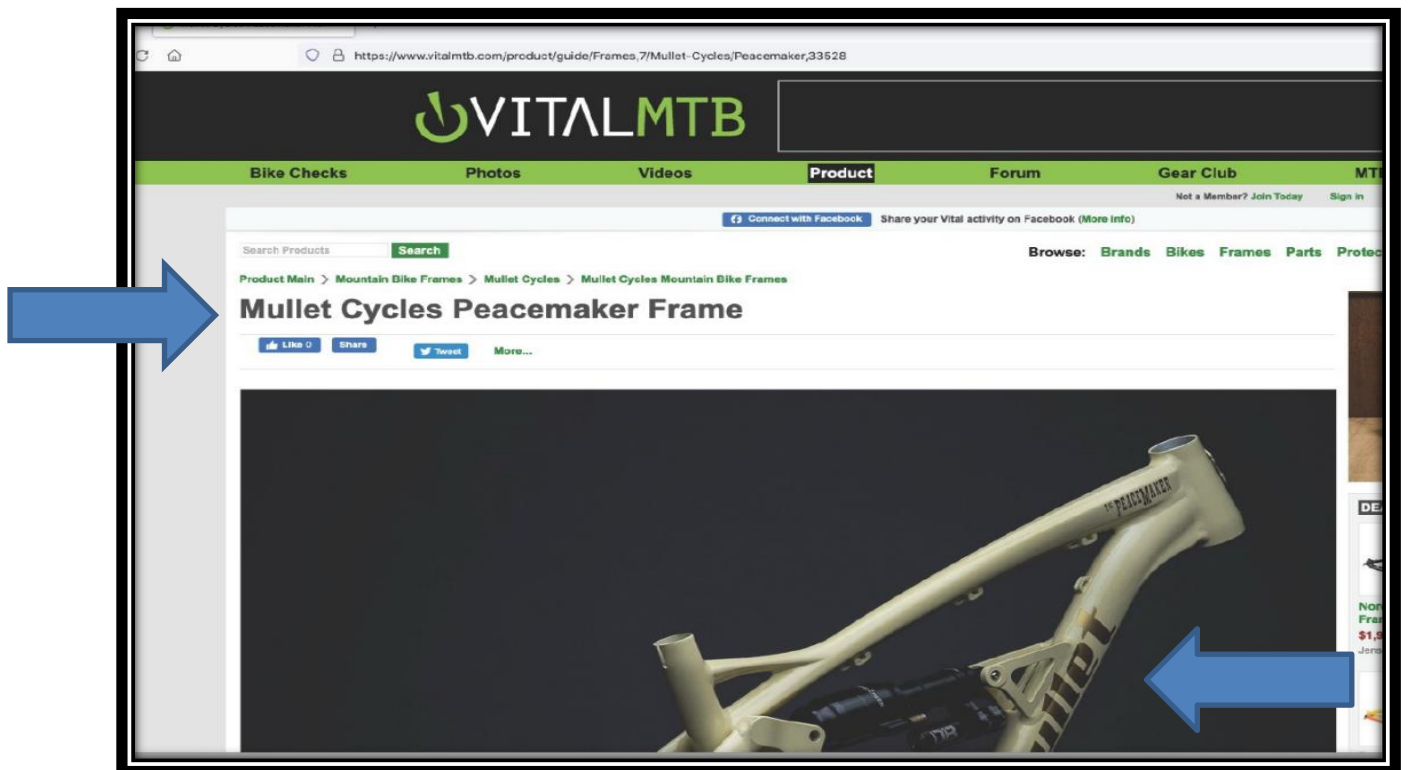
The first modern mixed wheel bikes were produced with the idea of getting both the rollover advantage of a big front wheel and the maneuverability of a smaller rear wheel. The problem is they simply mixed wheels on the current geometries. There was modest accomplishment with regard to the original intent, but those first designers were unable to realize the full range of benefits to be gained by a bike that not only mixed wheel sizes, but also had a geometry designed from the ground up specifically for the mixed wheel platform. My ride review below will elaborate on those benefits; you can also read Mullet's pitch here.

Editor's note: Mullet chooses not to share specific geometry specs like head tube angle, wheel base measurements, etc. for the Honeymaker, arguing that information is essentially their secret sauce.

- [www.singletracks.com](http://www.singletracks.com) (cont'd)

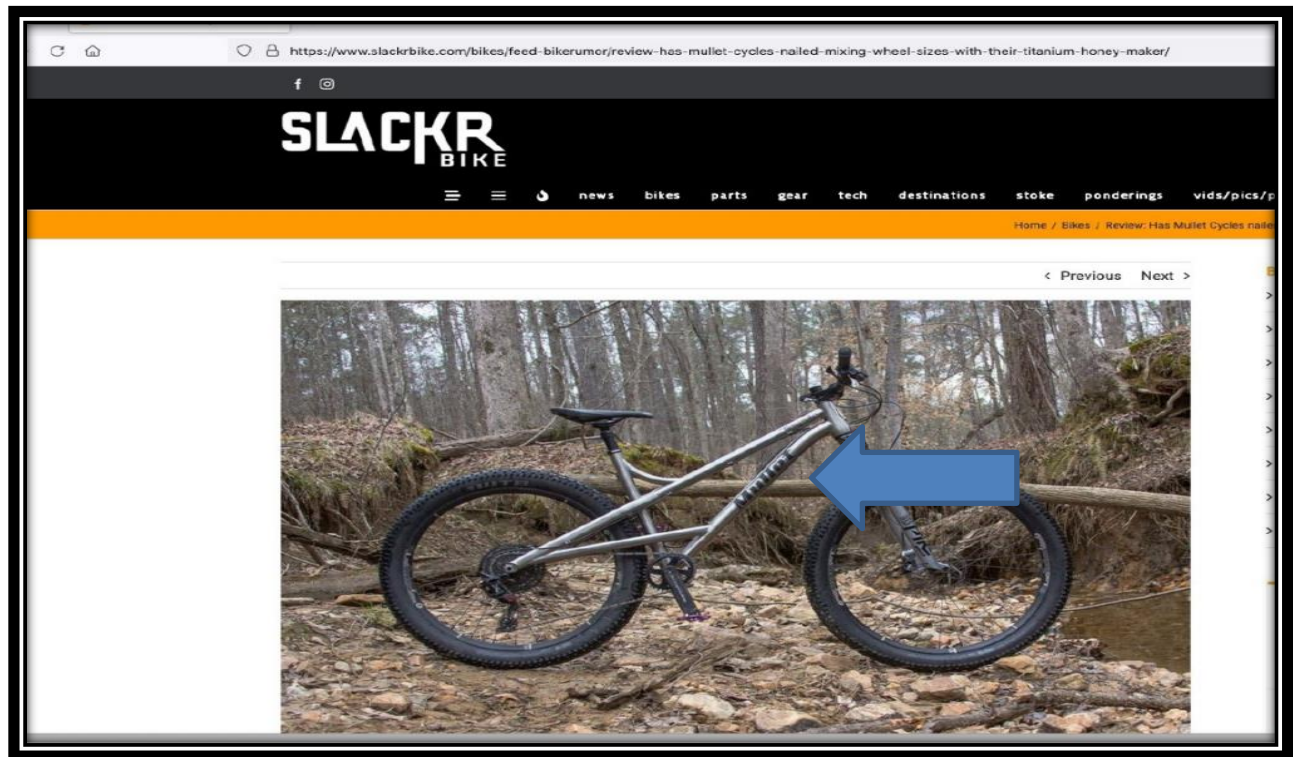


- [www.vitalmtb.com](http://www.vitalmtb.com)





- [www.slackrbike.com](http://www.slackrbike.com)



- [www.slackrbike.com](http://www.slackrbike.com) (cont'd)

## Review: Has Mullet Cycles nailed mixing wheel sizes with their titanium Honey Maker?

@ Bike Rumor! May 12, 2020 Bikes reviews, products, @Mullet Bikes, /Honey Maker, hardtails

Past attempts at mixed wheels have failed miserably so let's break down why do it in the first place, where things went wrong, and how Mullet Cycles fared in their attempt at developing their purpose-built 79'ers(?).

Wheel sizes, like chain lubes & oval chainrings never fall short of creating a debate, especially when there have been repeated failures at attempts to say... use different sized wheels on a mountain bike. The motorcycle industry figured out decades ago the benefits of having a larger front, than rear wheel for riding on the dirt but it never caught on with bicycles despite multiple tries. Like the ill-fated 24/26" wheeled Cannondale SM500 46er(?) in 1985 and later with attempts by Trek and a few other companies & frame builders with the short-lived 69er craze, nothing stuck.

While (still) having my doubts, I've changed my mind more than once on bicycle-related trends, (front suspension is heavy & slow, hard skinny tires are faster, underwear under bike shorts...). I had a rather long, nerdy chat with Mullet Cycles's founders about their secret geometry, handling, this bike being the future, blah blah blah. I was transparent about my dislike for the previous attempts at different wheel sizes and they still seemed more excited than ever to send me their Honey Maker to shred.

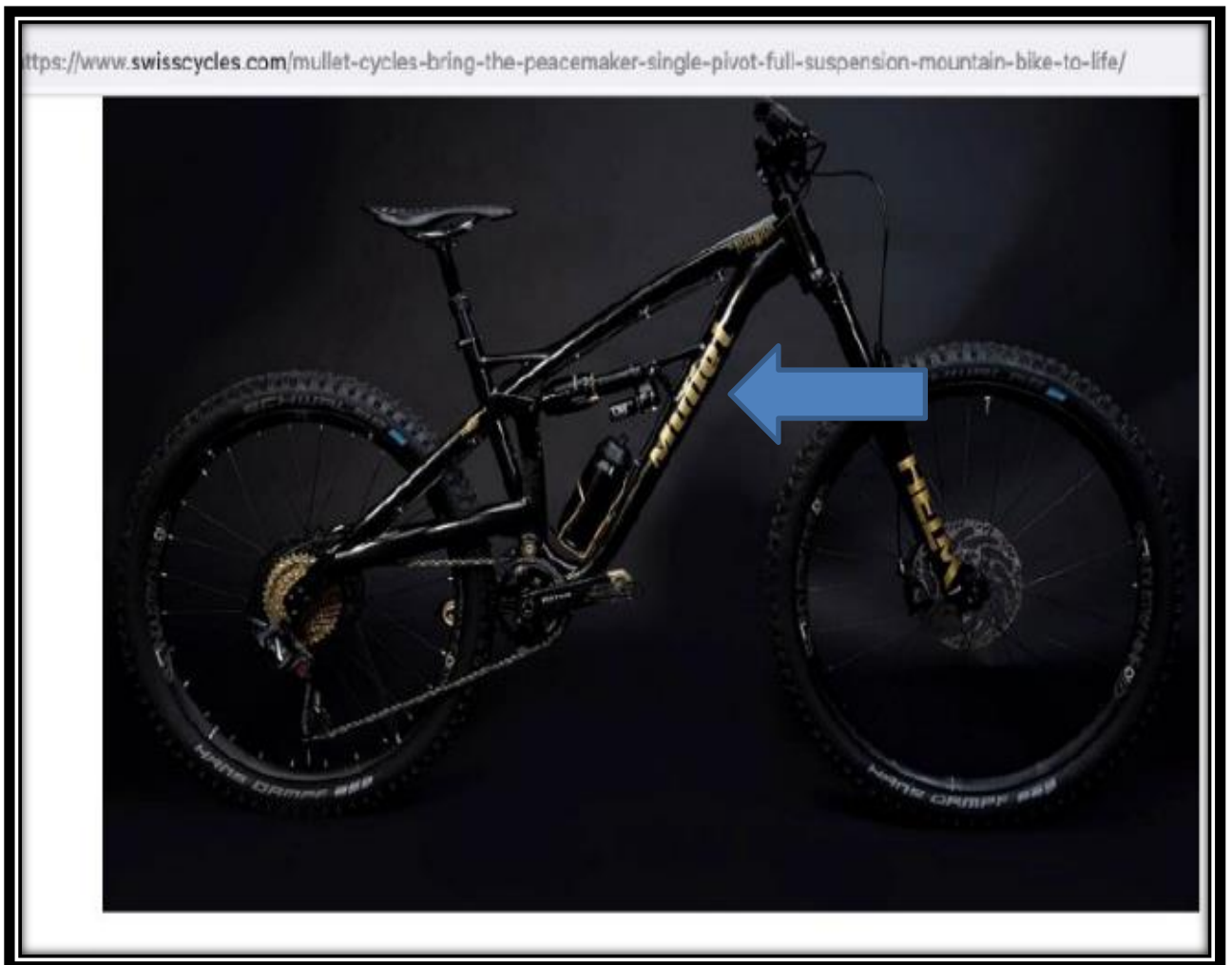
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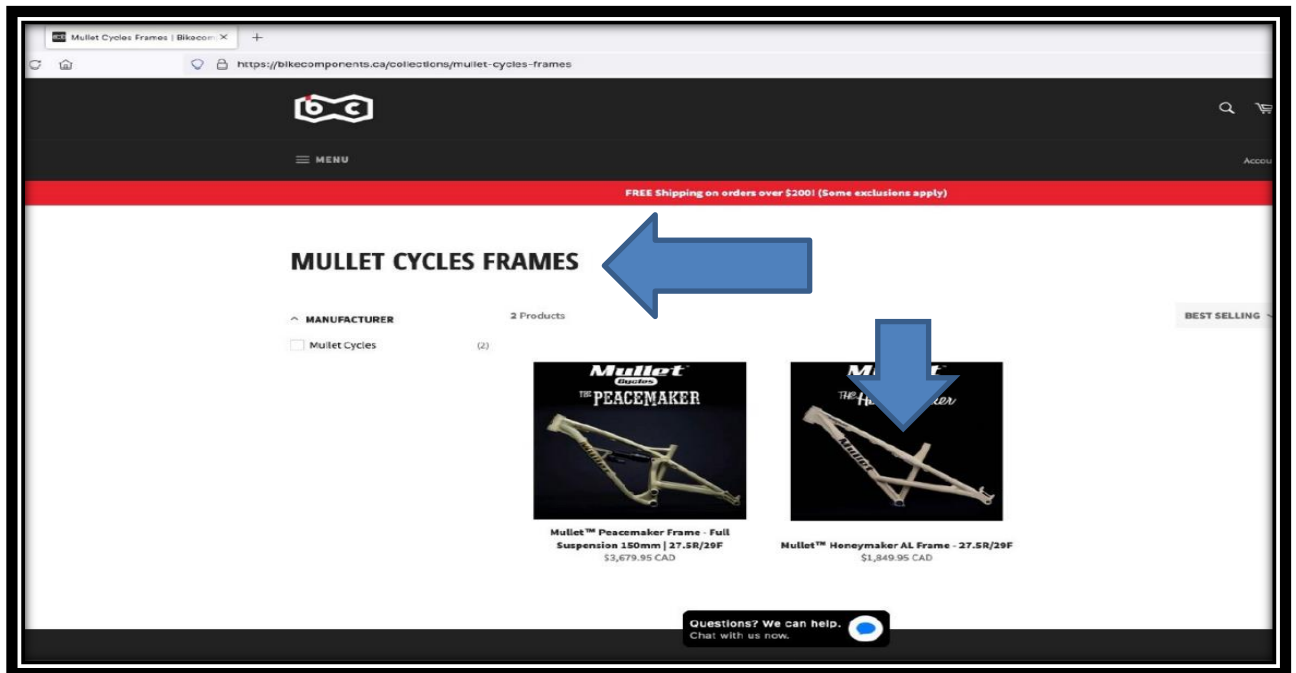
- [www.swisscycles.com](http://www.swisscycles.com)



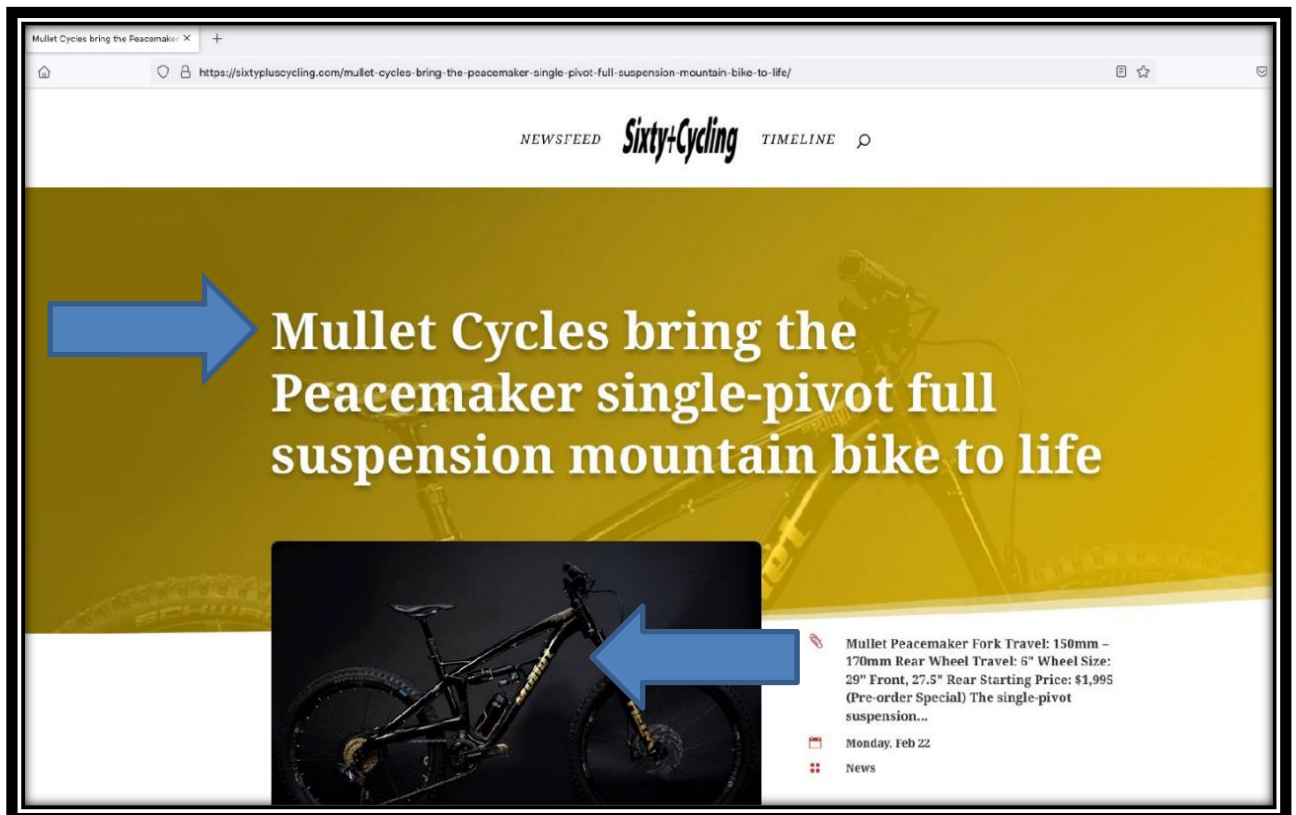
- [www.swisscycles.com](http://www.swisscycles.com) (cont'd)



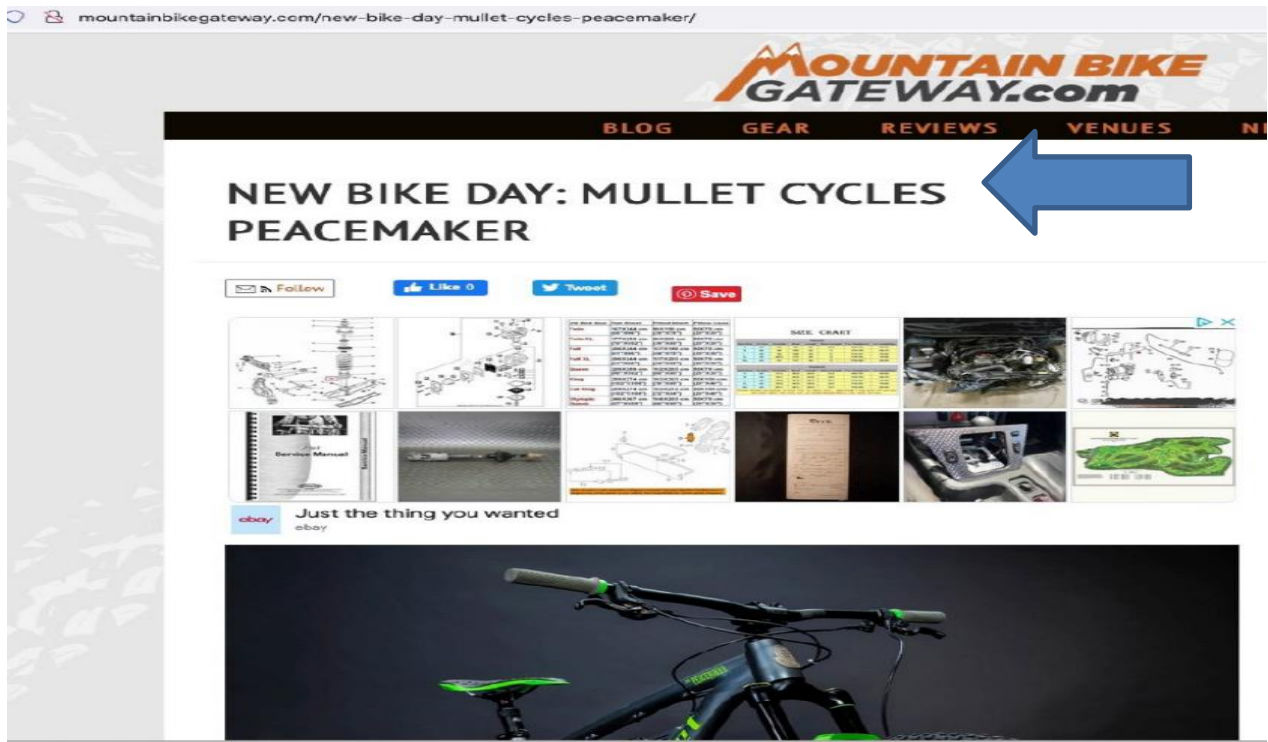
- [www.bikecomponents.ca](http://www.bikecomponents.ca)



- [www.sixtypluscycling.com](http://www.sixtypluscycling.com)



- [www.mountainbikegetaway.com](http://www.mountainbikegetaway.com)

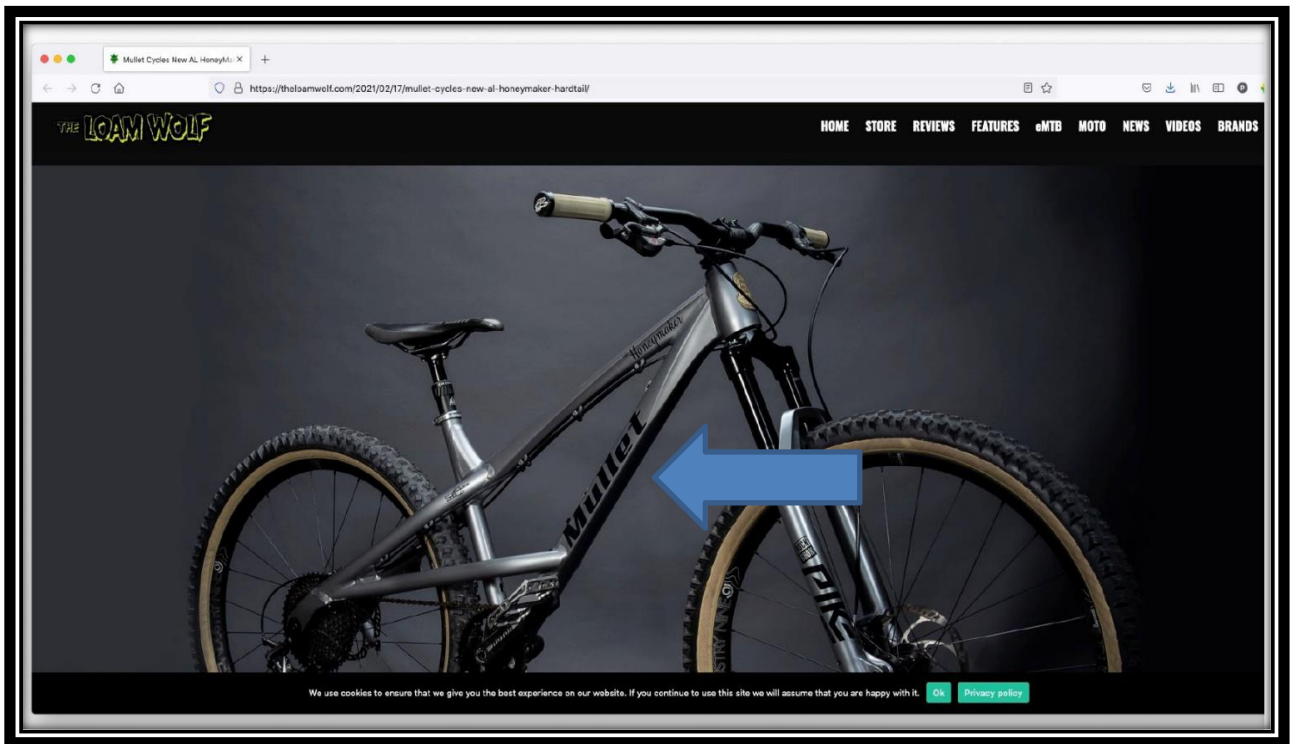


- [www.mountainbikegetaway.com](http://www.mountainbikegetaway.com) (cont'd)

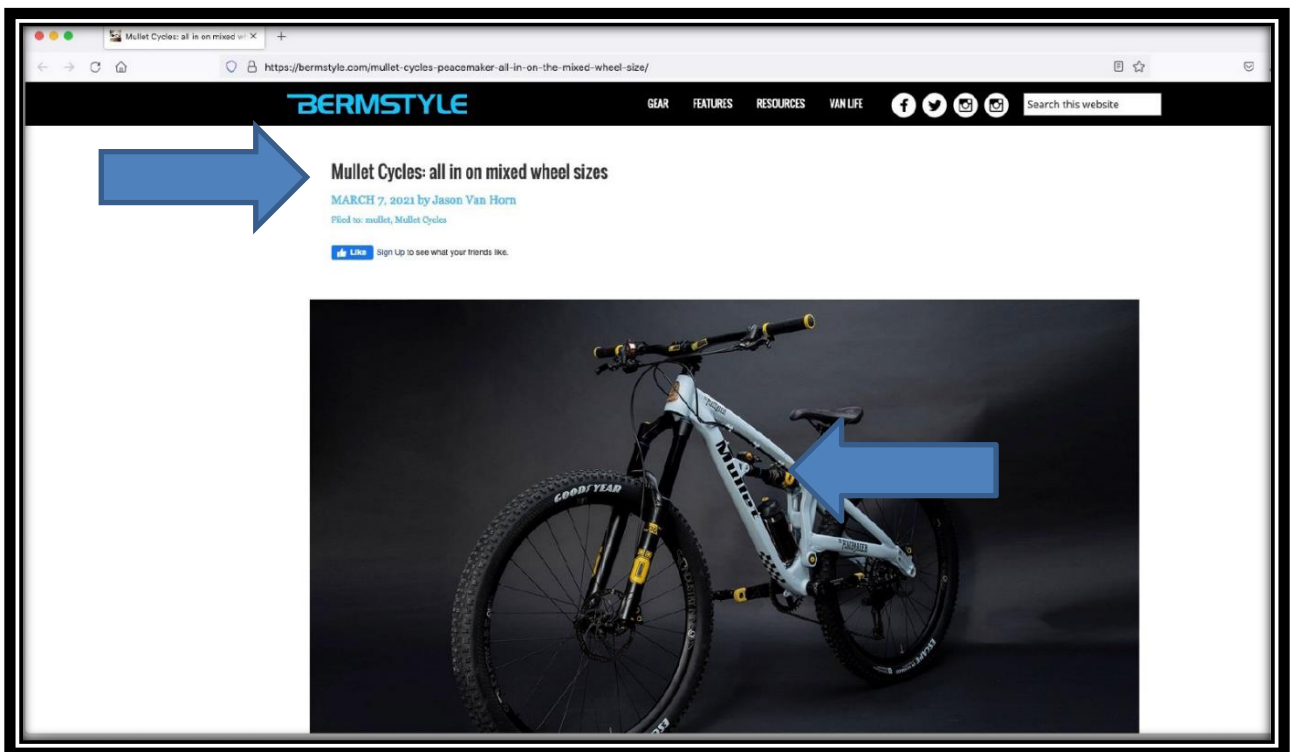


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- [www.thatloamwolf.com](http://www.thatloamwolf.com)

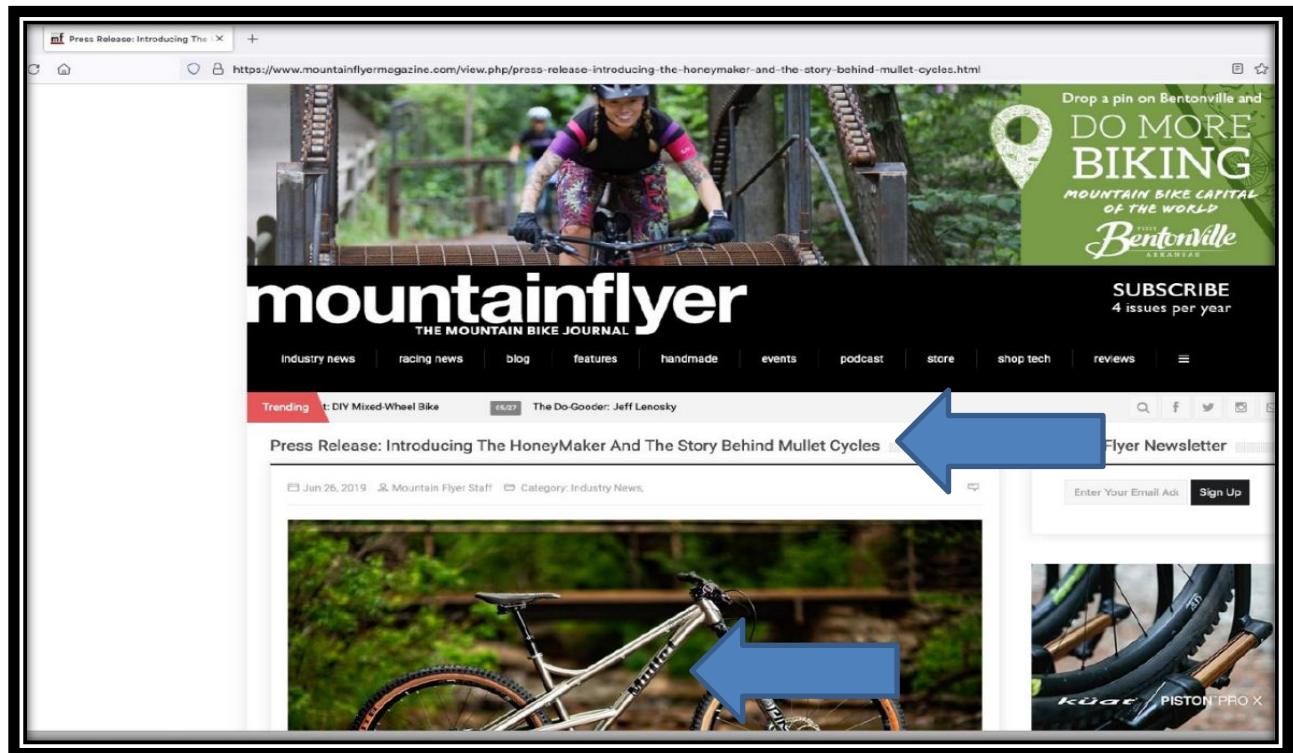


- [www.bermstyle.com](http://www.bermstyle.com)





- [www.mountainflyermagazine.com](http://www.mountainflyermagazine.com)



Additionally, Applicant submitted the declarations of the following three purported bicycle industry experts: (1) Josh Stallings, President and Founder of the Weiser MTB Club chapter of Southwest Idaho Mountain Biking Association (a Mountain bike advocacy group); (2) Michael Wottowa, a Board director of a not-for-profit association called Concerned Long Island Mountain Bicyclists, an organization dedicated to the growth and safe enjoyment of mountain cycling; and (3) John Fisch, a Board director for the Sustainable Trails Coalition, an advocacy organization dedicated to restoring mountain bike access to backcountry trails.<sup>9</sup> Each declarant asserts that: (1) he is quite familiar with the biking industry, particularly mountain biking; (2) currently,

<sup>9</sup> August 17, 2021 Request for Reconsideration (TSDR pp. 131-138).

the biking industry designates mixed wheel bikes as MX or “mixed wheels” because it is easy to remember and that is what these types of bicycles have always been called; and (3) whenever he hears the word MULLET being used in connection with cycling, he thinks of the brand MULLET CYCLES.<sup>10</sup>

Applicant further contends that since a third party, i.e., Trek Bicycle Corporation, had been issued a registration on the Principal Register for the standard character mark MULLET for “bicycles, bicycle frames, and bicycle structural parts thereof” the issuance of such a registration demonstrates that the term MULLET is not generic,<sup>11</sup> even though this registration has since been cancelled.<sup>12</sup> Additionally, Applicant maintains that a competitor, namely, Alchemy Bicycles, filed application Serial No. 88493441 for the mark MULLET in standard characters for “bicycles, bicycle frames, bicycle components, and bicycle structural parts thereof” in International Class 12, but this application was refused registration under Section 2(d) of the Trademark Act based on Applicant’s involved application.<sup>13</sup> Applicant further asserts, without evidence, that Alchemy Bicycle subsequently abandoned its application after recognizing Applicant’s rights to the mark MULLET.<sup>14</sup> Finally, Applicant contends that it has been diligent in policing its proposed MULLET mark, and some competitors

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<sup>10</sup> *Id.*

<sup>11</sup> Applicant’s Appeal Brief, p. 8 (14 TTABVUE 9)

<sup>12</sup> August 17, 2021 Request for Reconsideration (TSDR pp. 137-141).

<sup>13</sup> Applicant’s Appeal Brief, p. 7; 14 TTABVUE 8; August 17, 2021 Request for Reconsideration of Final Action (TSDR pp. 189-206).

<sup>14</sup> Applicant’s Appeal Brief, p. 7; 14 TTABVUE 8.

have favorably responded to Applicant's cease and desist letters enforcing its rights in its MULLET mark for bicycles.<sup>15</sup>

### **E. Analysis**

We first address Applicant's argument that because the designation MULLET was previously registered on the Principal Register for, among other things, bicycles, it cannot be considered generic for said goods. Applicant is mistaken.

"Trademark rights are not static." *In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 1391, 160 USPQ 730, 732 (CCPA 1969). A term that might not have been considered merely descriptive or generic in the past may now be considered so due to the frequency of its use over time. *See In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, at \*9 (TTAB 2019) (citing *In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 160 USPQ 730, 732 (CCPA 1969)). Eligibility for registration must be determined on the basis of the facts and evidence in the record at the time registration is sought, which includes during examination and any related appeal. *In re Chippendales USA Inc.*, 622 F.3d 1346, 1354, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010); *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1344, 213 USPQ 9, 18 (C.C.P.A. 1982); *In re Thunderbird Prods. Corp.*, 160 USPQ at 732. We also find that Applicant's argument that a third party failed to respond to an office action because it purportedly acknowledged Applicant's rights in the designation MULLET as a source indicator is merely speculative in nature and does not support Applicant's position that the term MULLET is not generic for its identified goods. The statements and arguments of

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<sup>15</sup> *Id.*; and August 17, 2021 Request for Reconsideration (TSDR pp. 198-206).



Applicant's attorney are not a substitute for evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) ("Attorney argument is no substitute for evidence.")); *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1339 (Fed. Cir. 2004) ("Statements of counsel . . . are not evidence.").

With regard to Applicant's policing argument, we note that the evidence submitted by Applicant merely reflects emails to third parties requesting that they cease and desist from using the term MULLET. There is no indication from this evidence that these third parties actually stopped using the term MULLET because of Applicant's purported proprietary rights in the term. In this case, we find that even if Applicant's competitors may have agreed to discontinue use of the word MULLET upon threat of legal action by Applicant, such action may show a desire by those competitors to avoid litigation, rather than demonstrating the distinctiveness of the wording. *See In re Wella Corp.*, 565 F.2d 143, 196 USPQ 7, n.2 (CCPA 1977); *In re Consol. Cigar Corp.*, 13 USPQ2d 1481, 1483 (TTAB 1989). *Cf. In re Cree, Inc.*, 818 F.3d 694, 118 USPQ2d 1253, 1259 (Fed. Cir. 2016) (because it is cheaper to take a license than defend a patent infringement action, licenses are often entered into to avoid litigation).

That being said, and while we bear in mind the practicalities of the limited resources available to USPTO examining attorneys, *see, e.g., In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003) (Federal Circuit was "mindful of the reality that the PTO is agency of limited resources"), we nonetheless find that the Examining Attorney has failed to establish that the designation MULLET would be

perceived by consumers as the generic name for a subcategory of bicycles. Rather the evidence submitted by both the Examining Attorney and Applicant presents a record with mixed uses of the designation MULLET, in trademark and non-trademark form.<sup>16</sup> More specifically, while the Examining Attorney submitted evidence demonstrating that the term MULLET is the generic name of a type of bicycle, Applicant offset such evidence by submitting approximately the same amount of evidence, i.e., third-party websites in the biking industry and declarations from persons familiar with the mountain bike industry, showing the term as Applicant's trade name or trademark used in connection with bicycles.<sup>17</sup>

Under these circumstances, the evidence of mixed use of MULLET makes it unclear on this record whether the term MULLET is generic for a subcategory of bicycles. *See Merrill Lynch*, 4 USPQ2d at 1143; *Alcatraz Media, Inc.* 107 USPQ2d at 1765; *In re America Online*, 77 USPQ2d at 1623 (TTAB 2006). In other words, the evidence of record, when viewed in its entirety, fails to establish that the primary significance of MULLET to the relevant public is a type of bicycle, rather than a bicycle provided by a particular entity.

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<sup>16</sup> For example, the screenshot from the website [www.bikemag.com](http://www.bikemag.com) submitted by the Examining Attorney, as reproduced above, shows use of the term MULLET as both a type of bicycle and as a trade name/trademark. *See* September 15, 2019 Office Action (TSDR pp. 20-26). We hasten to add that the screenshots from the websites [www.swisscycles.com](http://www.swisscycles.com) and [www.citypluscycling.com](http://www.citypluscycling.com) submitted by Applicant, *see* August 17, 2021 Request for Reconsideration (TSDR pp. 71-81 and 84-85), also demonstrate the term MULLET being used as both a source indicator and as the generic name of a type of bicycle.

<sup>17</sup> While we acknowledge that some of the third-party articles submitted by Applicant constitute press releases provided by Applicant, we nonetheless find that relevant consumers, upon viewing such articles, would perceive the term MULLET as a source indicator of Applicant's identified goods.

## II. Conclusion

We find, based on the evidence of record, that the Office has not established that the designation MULLET is generic for the identified goods. See *In re Merrill Lynch*, supra. Genericness is a fact-intensive determination, and the Board's conclusion must be governed by the record that is presented to it. Although we may have concerns about the genericness of Applicant's designation, it is the record evidence bearing on purchasers' perceptions that controls the determination, not general legal rules or our own subjective opinions. Any doubts raised by the lack of evidence or mixed usage of a term must be resolved in Applicant's favor. *Id.* Further, on a different and more complete record, such as might be adduced by a competitor in an opposition proceeding, we might arrive at a different result on the issue of genericness, but we must base our determination herein on the record now before us.

**Decision:** The refusal to register Applicant's proposed MULLET mark on the Supplemental Register on the ground that the designation is the generic name of the subgenus or subcategory of Applicant's identified goods under Sections 23(c) and 45 of the Trademark Act is reversed.